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Supreme Court of the United States

October Term, 1937

No. 453

GENERAL ELECTRIC COMPANY,

Petitioner,

vs.

WABASH APPLIANCE CORPORATION, ABE ADLER and ABE M. PARKER,

Respondents.

MEMORANDUM FOR RESPONDENTS ON PETITION FOR WRIT OF CERTIORARI.

SAMUEL E. DARBY, JR.,
PAUL KOLISCH,
Counsel for Respondents.

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It is correct that the Court of Appeals for the Second Circuit, in the present case, has held to be invalid the same claims which the Court of Appeals for the Ninth Circuit held to be valid in the case of *Anraku* v. *General Electric Co.*; 80 Fed. (2d) 958. We desire to point out, however, that the decision of the Court of Appeals in the present case was based on evidence and testimony which were not before the Court of Appeals in the Ninth Circuit in the *Anraku* case. The Court in the present case took pains to "assume" the correctness of the decision of the Court of Appeals in the Ninth Circuit (Rec. p. 448), and then proceeded to arrive at a conclusion of invalidity of the claims "on another point". This other point on which the Court of Appeals predicated its decision in the present case consisted of a matter of unrebutted fact established by the testimony and exhibits adduced by no less than six witnesses

(viz.: Cowles and Laise, whose testimony is referred to in the opinion of the Court of Appeals, and in addition thereto the testimony of Kober, Spielholz, North, Padowicz, and Spina). Neither the testimony of these witnesses nor the substance of the evidence to which their testimony was directed, was before the Court of Appeals in the *Anraku* case.

If, under these circumstances, this Court is of the belief that the diversity of ultimate result between the Circuit Courts of Appeals of the Ninth and Second Circuits should be settled by a review of this case, we do not oppose the grant of a writ of certiorari.

We desire, however, to traverse the second ground, argumentative in nature, which is advanced by petitioner as a reason for the grant of a writ of certiorari. It is believed that a mere reading of the opinion of the Court of Appeals of the Second Circuit shows the want of merit in the contentions here advanced by petitioner.

Conclusion.

If, in view of the foregoing, a review of the present case is deemed by this Court to be appropriate, respondents do not oppose the grant of the writ of certiorari, and are prepared to convince the Court of the soundness of the decision of the Court of Appeals of the Second Circuit.

SAMUEL E. DARBY, JR.,
PAUL KOLISCH,
Counsel for Respondents.

Dated: New York, New York.
October 4th, 1937.

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